

N.D.A.G. Letter to Bensen (Jan. 10, 1985)

January 10, 1985

Mr. Steven P. Bensen, CPA
Chief Auditor
Office of the State Auditor
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Bensen:

Thank you for your letter of December 4, 1984, in which you inquire as to what steps must be taken by the North Dakota Board of Examiners in Watchmaking or the State Auditor's Office in order to officially end the duties and functions of the Board as outlined in N.D.C.C. Ch. 43-27.

The North Dakota Board of Examiners in Watchmaking (hereinafter "Board") was created by the North Dakota Legislative Assembly through the passage of 1959 N.D. Sess. Laws Ch. 317, codified as N.D.C.C. Ch. 43-27.

N.D.C.C. Ch. 43-27, among others, mandates that the Board "shall administer the provisions of this chapter" (N.D.C.C. § 43-27-04) which includes the examination, registration, and regulation of "watchmakers" in North Dakota. As a board of the executive branch of state government, the Board constitutes an "administrative agency" as that term is defined in N.D.C.C. §28-32-01, of the North Dakota Administrative Agencies Practices Act (N.D.C.C. Ch. 28-32). Generally, administrative agencies and the powers such agencies exercise are subject to expansion, contraction, or abolition at the will of the governmental branch creating them which, in this particular case, is the Legislature. See 1 Am Jur.2d Administrative Law, § 25 (1962); see also State ex rel. Prater v. State Board of Finance, 279 P.2d 1042 (N.M. 1955) and City of Chicago v. O'Connell, 116 N.E. 210 (Ill. 1917).

Additionally, the power to create a public office or other public agency or entity generally includes the power to modify or abolish it. See 63A Am Jur.2d Public Officers and Employees, § 31 (1984 and Power v. Secretary of the Department of Community Affairs, 388 N.E.2d 304 (Mass. App. Ct. 1979). Moreover, the right of the Legislature to delegate power to create or abolish a public office is generally denied and, where there has been a lawful delegation of such power to a governmental agency or political subdivision, that governmental agency or political subdivision is the appropriate entity to exercise such powers. See 63A Am Jur.2d Public Officers and Employees, § 33 (1984). Since "administrative agencies" and "public offices," primarily derive their existence and authority from the Legislature, the same general rule with respect to the Legislature's authority to delegate power to create or abolish "public offices" also applies to "administrative agencies."

In the present case, the North Dakota Legislature established the Board through the enactment of N.D.C.C. Ch. 43-27, and has not delegated the authority to abolish the Board to the Governor or any other executive department or agency. Therefore, since the Legislature created the Board and has not delegated the power to abolish the Board to the executive branch of government, then it has the sole authority to terminate and abolish the Board. Neither the Board nor the State Auditor's Office have any authority to modify or discontinue the statutory duties and functions of the Board.

The proper procedure to be taken by the North Dakota Board of Examiners in Watchmaking for the purpose of terminating their duties and responsibilities under N.D.C.C. Ch. 43-27, would be to introduce a bill in the upcoming North Dakota Legislative Session to repeal N.D.C.C. Ch. 43-27.

I should also point out that based upon the above discussion the Board has no authority to discontinue or modify any of its duties prescribed by N.D.C.C. Ch. 43-27, and the Board's motion made at its September 16, 1984, meeting is null and void and of no legal effect. Therefore, until and unless the North Dakota Legislature repeals N.D.C.C. Ch. 43-27, the Board is obliged to fulfill all of its statutory duties under N.D.C.C. Ch. 43-27.

Sincerely,

Nicholas J. Spaeth

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cc: Dean B. Johnson, Secretary-Treasurer
North Dakota Board of Examiners in Watchmaking